

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 358 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

YUSUFALI HASANALI

Versus

SAFDAR HUSAIN ABDUL RAHIM

Appearance:

MR DU SHAH for Petitioner
MR YOGESH S LAKHANI for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 01/09/2000

ORAL JUDGEMENT

#. Being aggrieved by the judgment and decree dated 03.08.1993, passed by the then learned District Judge at Rajkot, in Regular Civil Appeal No.104 of 1981 on his file dismissing the appeal and confirming the judgment

and decree, passed by the then learned 2nd Jt.Civil Judge (S.D) at Rajkot on 30.8.1981, in Regular Civil Suit No. 1233 of 1978 on his file, dismissing the suit, the appellant (original plaintiff) has preferred this Second Appeal challenging the legality and validity of the decree passed.

#. Necessary facts appearing on record may in brief be for appreciating the contentions raised stated. It may be stated that I will be referring the parties by their original status. The appellant is original plaintiff while the respondents are the original defendants. The plaintiff purchased his present house in public auction held by the Court on 25.3.1958. At that time, the house belonged to Hirachand Tulsidas and adjoining portion at present in possession of the defendants as tenants also in past belonged to Hirachand Tulsidas. The property i.e. entire house was then partitioned. The portion of the house purchased by the plaintiff fell to the share of Pranlal whereas defendants' portion fell to the share of Ratilal Hirachand. Sometimes thereafter, when the house was auctioned out, the plaintiff purchased the portion of the said property. In his name the sale certificate (Exh.24) was issued by the Court. Rajkumariben Mulchand, the widow of Ratilal Hirachand sold her portion of the house to the defendants. According to the plaintiff he was having the way through the fali land for the purpose of ingress and egress. He enjoyed the said right of way upto 1977. It seems plaintiff and defendants by passage of time could not maintain harmony. Because of some difficulties being created by the defendants a wall in the fali land was constructed. Owing to the construction of that wall, the right of way which was acquired as an easement of necessity was obstructed. Hence, the plaintiff filed Regular Civil Suit No.1233 of 1978 for a declaratory as well as injunctive relief. The defendants on being served with the summons appeared before the lower Court and resisted the suit denying the allegations levelled against them in the plaint. Necessary issues were raised and the parties led the evidence. Appreciating the evidence before him, the learned Civil Judge (S.D) reached the conclusion that the plaintiff failed to establish the right he was claiming through Dela and Fali land. The plaintiff also failed to establish that the wall came to be constructed only in 1977. Consequently, he held that the prohibitory and mandatory injunction sought for could not be granted. He, in the result, dismissed the suit. The plaintiff carried the matter in appeal before the District Court at Rajkot. The then learned District Judge after

appreciating the evidence found that there was no justifiable reason to interfere with the judgment and decree passed by the lower Court. He therefore upheld the same and dismissed the appeal. It is against that judgment and decree the present Second Appeal is filed.

3. In the case on hand, the right of way alleged to have been acquired by way of easement of necessity, is claimed by the plaintiff. As per the requirement of Section 13 of the Easement Act, it is to be established that the tenement is severed into two parts and without the easementary right the severed part cannot be used or enjoyed at all because the same on severance has come to be situated in land locked position. On severance of the tenement therefore absolute necessity of easement for the severed part is contemplated. But the said necessity does not mean convenience or saving of expenditure or better utilization. The plaintiff claiming right of way by easement of necessity that arose because of severance of the house has therefore to establish that the portion of the house for which the easementary right of way is claimed has on severance come to be situated in such a way that no way for ingress and egress is left apart or available at all except the one he is claiming over the defendants property of which his portion was before severance a part and parcel, and without the said way, it is not possible to use and enjoy his house. He has to establish absolute necessity and should also further show that the said necessity still continues and has not ceased.

4. In view of such requirements, both the Courts below have considering the evidence led with care and discussing the same elaborately reached the conclusion, that the plaintiff has failed to establish the case he has alleged qua acquisition of the right by way of easement of necessity, and on going through the evidence with meticulous care and finicky details, I have not been able to find fault with both the Courts. The appreciation of evidence made by both the Courts is quite just and legal, the same is not arbitrary or perverse. The reasons assigned for drawing conclusions are weighty and logical. I am in general agreement with the same and so it is not necessary to restate the same.

5. According to the learned Advocate for the appellant the Courts below have erred in interpreting the documents produced at Ex.24,29,30,31 and 33 but the contention cannot be accepted. All these documents are the documents of title of both the portions of the same

property. The lower Courts have reached conclusions after considering the contents of those documents in details and assigning the logical reasons. The documents are neither mis-read nor erroneously construed. The cumulative effect thereof is rightly taken into account. There is no reason to hold that owing to faulty construction mis-carriage of justice has resulted into. The contention therefore fails.

6. No other point is raised. The learned Advocate for the appellant after going through the evidence both oral and documentary fairly concedes that no substantial question of law is involved in this appeal. For the aforesaid reasons, the point raised do not favour the appellant. The decision of both the Courts below in short suffers from no infirmity justifying the inference of this Court.

7. For the aforesaid reasons, this appeal is required to be dismissed and is hereby dismissed with no order as to costs.

m.m.bhatt